

Federal Communications Commission
Office of the Secretary

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Arkansas Cable Telecommunications)	EB Docket No. 06-53
Association; Comcast of Arkansas, Inc.;)	
Buford Communications I, L.P. d/b/a)	
Alliance Communications Network;)	
WEHCO Video, Inc.; and TCA Cable)	EB-05-MD-004
Partners d/b/a Cox Communications,)	
)	
<i>Complainants,</i>)	
)	
v.)	
)	
Entergy Arkansas, Inc.,)	
)	
<i>Respondent.</i>)	
)	

To: The Honorable Arthur I. Steinberg
 Administrative Law Judge

**REPLY TO OPPOSITIONS TO RESPONDENT'S MOTION
TO ENLARGE, CHANGE AND DELETE ISSUES PRESENTED IN
THE HEARING DESIGNATION ORDER**

1. Pursuant to Section 1.229 of the Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.229, Entergy Arkansas, Inc. ("EAI") hereby submits its consolidated Reply to the Opposition of the Enforcement Bureau and Reply to the Opposition of Complainants to EAI's Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order in the above-captioned proceeding.¹ EAI is pleased that the Bureau

¹ Entergy Arkansas, Inc. Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order, EB Docket No. 06-53, File No. EB-05-MD-004 (filed May 4, 2006) ("Motion"); Opposition to Respondent's Motion to Enlarge, Change and Delete Issues Presented

recognizes EAI's legitimate concerns regarding the broad scope of Issue 4(c) of the Hearing Designation Order ("HDO") and appreciates the Bureau's efforts to address these concerns by providing its own proposed revision intended to narrow the scope of this issue. At the same time, EAI acknowledges the Bureau's concerns regarding the revision proposed by EAI in its initial Motion. Although the revision proposed by the Bureau in its Opposition is still overbroad, EAI and the Bureau are very close on this issue, and EAI believes that its reply to the Bureau's proposal, as set forth below, represents an appropriate compromise that would sufficiently address the concerns of all of the Parties in this proceeding.

2. With respect to the Complainant's Opposition, the Complainants have apparently misconstrued EAI's requested revision to Issue 4(c) of the HDO, since much of their Opposition addresses positions or issues that were not taken -- nor even raised -- by EAI in its Motion. Nevertheless, EAI will endeavor to address the Complainants' Opposition herein to the extent such issues are relevant to the Motion.

I. EAI'S REPLY TO THE BUREAU'S OPPOSITION APPROPRIATELY ADDRESSES THE CONCERNS OF ALL PARTIES TO THIS PROCEEDING

3. Although it requested that EAI's Motion be denied, the Bureau agrees in its Opposition that the language of Issue 4(c) in the HDO is overbroad and should be narrowed in scope "to limit consideration of Entergy's electric operation practices only to those practices that relate to the Complainants."² The Bureau opposes EAI's requested revision to Issue 4(c) because it

in the Hearing Designation Order, EB Docket No. 06-53, File No. EB-05-MD-004 (filed May 12, 2006) ("Complainants' Opposition"); Opposition of the Enforcement Bureau to Respondent's Motion to Enlarge, Change and Delete Issues Presented in the Hearing Designation Order, EB Docket No. 06-53, File No. EB-05-MD-004 (filed May 15, 2006) ("Bureau's Opposition").

² Bureau's Opposition at 1 – 2.

considers the proposed language to be vague. The Bureau instead proposes the following revision to Issue 4(c):

“To determine whether, on the Entergy poles to which Complainant’s *[sic]* facilities are attached, Entergy has installed electric facilities out of compliance with the NESC and/or Entergy’s own standards, and if so, whether it has unreasonably attempted to hold Complainants responsible for costs associated with correcting those conditions.”³

4. However, the Bureau’s proposed revision does not serve to narrow the scope of Issue 4(c) to the extent the Bureau apparently intends, since it would still require the Administrative Law Judge (ALJ) to make determinations related to wholly electric operations and practices outside the scope of the Pole Attachments Act⁴ simply because there happens to be a communications attachment on the pole. This alone does not provide a sufficient nexus between electric utility practices and communications attachments to resolve the jurisdictional tension that necessitated EAI’s Motion.⁵ At a minimum, there must also be a causal relationship between the utility practice in question and the cited safety violations charged to the communications attachment.

5. Nevertheless, as evidenced in the Motion and in the Bureau’s Opposition, EAI and the Bureau are essentially in agreement regarding the actual intent and purpose behind Issue 4(c). According to the Bureau, “Entergy correctly notes that issue 4(c) ‘is ultimately directed at determining responsibility where conditions on a given pole are non-compliant with applicable safety and engineering standards and, consequently, which party should bear the costs associated with correcting conditions on that pole’.”⁶ To the extent the scope of the ALJ’s inquiry extends to EAI’s electric facilities, it appears that the Bureau and EAI agree that Issue 4(c) is intended to

³ Bureau’s Opposition at 3 – 4.

⁴ 47 U.S.C. § 224; *See also* HDO at ¶¶ 8-12.

⁵ Motion at 2 – 4.

⁶ Bureau’s Opposition at 3 (quoting EAI’s Motion at 3 – 4).

address only those electric facilities installed by Entergy in such a way as to result in conditions where the Complainants' attachments are no longer in compliance, and, where this is the case, to determine whether EAI has unreasonably attempted to charge Complainants for correcting these conditions. The sole point of disagreement between EAI and the Bureau on this issue therefore appears to be with respect to how Issue 4(c) itself should be phrased in order to most appropriately reflect this common position.

6. Therefore, in reply to the Bureau' Opposition, EAI submits an alternate revision to Issue 4(c) of the HDO. Specifically, EAI submits that Issue 4(c) be revised to read as follows:

“To determine whether, on those poles where Entergy has reported violations by Complainants, Entergy's installation of electric facilities resulted in Complainants' attachments being out of compliance with the NESC and/or Entergy's own standards, and if so, whether Entergy has unreasonably attempted to hold Complainants responsible for costs associated with correcting these conditions.”

7. EAI submits that this language accurately reflects the positions expressed by both the Bureau and EAI in their filings and addresses the Parties' respective concerns regarding vagueness or overbreadth. This language also appropriately reflects and encompasses the allegations made by Complainants – including all of those raised in Complainants' Opposition – thus representing an appropriate statement of the issue that sufficiently addresses the rights and concerns of all of the Parties to this proceeding.

II. EAI'S REPLY TO COMPLAINANTS' OPPOSITION

8. EAI can only surmise that Complainants misread or misconstrued the Motion, since much of Complainants' Opposition is directed at issues or positions that were neither taken, nor even raised, by EAI in its Motion. For example, Complainants argue strenuously against the deletion of Issue 4(c),⁷ even though EAI never requested that this issue be deleted; rather, EAI

⁷ See Complainants' Opposition at 4 – 7.

expressly stated in the Motion that the issue itself is appropriate for review in this proceeding and requested only that it be rephrased.⁸ The Complainants also expend substantial energy (and sheets of paper) raising new factual allegations and repeating others that have long been on the record, yet not once do they even attempt to show that EAI's requested revision would somehow leave these allegations unaddressed, nor do they dispute EAI's characterization of the actual intent and purpose behind Issue 4(c) – a characterization that the Bureau accepted as correct.⁹

9. Finally, the Complainants allege that the Motion does not satisfy the procedural requirements of Section 1.229(d) of the Commission's Rules, 47 C.F.R. § 1.229(d), because EAI did not assert any "facts" and because "[t]he only thing resembling an affidavit attached to EAI's submission is the catch-all 'Verification' (*i.e.*, not 'affidavit' as the rules require) of counsel." These allegations are unfounded. The Motion is directed at revising the language of a single issue in order to clarify an internal inconsistency in the HDO regarding the question of jurisdiction. Jurisdiction is a question of law, not of fact, and any allegation of fact regarding this question would therefore be inappropriate. Nevertheless, because EAI's Motion includes representations of the record, EAI determined that, while an affidavit is generally not necessary to support purely legal arguments, the inclusion of a verification that met all the requirements of Section 1.16 of the Commission's Rules ("Unsworn declarations under penalty of perjury in lieu of affidavits"), 47 C.F.R. § 1.16, would be prudent in light of the requirements of Section 1.229(d) of the Rules.

⁸ See Motion at 4. As Complainants themselves noted, EAI also objected to this same phrasing for the same reasons when the parties entered into their Joint Statement of the Issues (filed August 29, 2005), but did not object to the inclusion of the issue itself. Complainants' Opposition at 7.

⁹ Bureau's Opposition at 3.

III. CONCLUSION

10. It is apparent that EAI and the Bureau agree that Issue 4(c) is intended to address only those electric facilities installed by Entergy in such a way as to result in conditions where the Complainants' attachments are no longer in compliance, and, where this is the case, to determine whether EAI has unreasonably attempted to charge Complainants for correcting these conditions. Therefore, in response to the concerns raised by the Bureau in its Opposition, EAI hereby modifies its requested revision to Issue 4(c) to read:

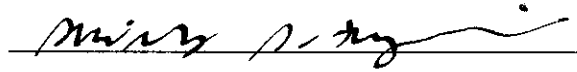
"To determine whether, on those poles where Entergy has reported violations by Complainants, Entergy's installation of electric facilities resulted in Complainants' attachments being out of compliance with the NESC and/or Entergy's own standards, and if so, whether Entergy has unreasonably attempted to hold Complainants responsible for costs associated with correcting these conditions."

11. EAI submits that this is an appropriate statement of the issue that provides the necessary jurisdictional nexus between EAI's electric utility operations and the Pole Attachments Act and which appropriately addresses the rights and concerns of all of the Parties to this proceeding, thus enabling the ALJ to reach a "just, equitable, and expeditious resolution" in this proceeding.¹⁰ For these reasons, the issue presented as Issue 4(c) in the HDO must be amended as set forth herein.

¹⁰ HDO at ¶ 6.

WHEREFORE, THE PREMISES CONSIDERED, Entergy Arkansas, Inc. respectfully requests that the ALJ grant its request to revise Issue 4(c) of the HDO and reform the HDO accordingly.

Respectfully submitted,



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Dated: May 19, 2006

CERTIFICATE OF SERVICE

I, David D. Rines, do hereby certify that on this 19th day of May 2006, a single copy (unless otherwise noted) of the foregoing "Motion to Enlarge, Change and Delete Issues" was delivered to the following by the method indicated:

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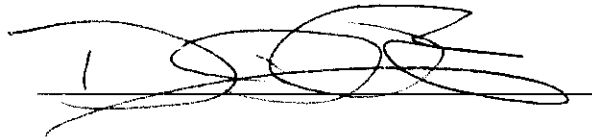
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